

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Aug 28, 2023**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RON S. O/B/O DANA S.  
(DECEASED),

Plaintiff,

v.

KILOLO KIJAKAZI,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

NO: 1:21-CV-03075-LRS

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
GRANTING IN PART AND DENYING  
IN PART DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.  
ECF Nos. 16, 17. This matter was submitted for consideration without oral  
argument. Plaintiff is represented by attorney D. James Tree. Defendant is  
represented by Special Assistant United States Attorney Katherine B. Watson. The

1 Court, having reviewed the administrative record and the parties' briefing, is fully  
2 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 12, is  
3 granted in part and Defendant's Motion, ECF No. 13, is granted in part and denied in  
4 part.

### 5 JURISDICTION

6 Dana S.<sup>1</sup> (Plaintiff) filed for disability insurance benefits and supplemental  
7 security income on May 23, 2016, alleging in both applications an onset date of  
8 November 1, 2014. Tr. 291-301. Benefits were denied initially, Tr. 185-91, and  
9 upon reconsideration, Tr. 194-206. Plaintiff appeared at a hearing before an  
10 administrative law judge (ALJ) on June 21, 2018. Tr. 65-89. On August 20, 2018,  
11 the ALJ issued an unfavorable decision, Tr. 13-33, and the Appeals Council denied  
12 review. Tr. 1-6. Plaintiff appealed to the U.S. District Court, and on July 24, 2020,  
13 the Honorable Rosanna Malouf Peterson issued an order remanding the matter for  
14 additional proceedings. Tr. 1577-99.

15 On January 19, 2021, Plaintiff appeared at a second hearing, Tr. 1529-57, and  
16 on February 3, 2021, the ALJ issued a second unfavorable decision. Tr. 1497-1527.  
17 The matter is now before this Court pursuant to 42 U.S.C. § 405(g).

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18 <sup>1</sup> The last initial of the deceased claimant and the person acting on his behalf is  
19 used to protect privacy. The deceased claimant is referenced herein as "Plaintiff"  
20 for clarity.  
21

## BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are therefore only summarized here.

Plaintiff was 34 years old at the time of the 2018 hearing. Tr. 41. He had work experience as a carpenter. Tr. 58. At the January 2021 hearing, Plaintiff testified his anxiety had become worse since the previous hearing. Tr. 1534. He had a shoulder injury in 2013. Tr. 44. The pain has been getting worse the longer it went uncorrected. Tr. 47. He had asthma. Tr. 44. He had a spinal fusion in July 2016 which helped "tremendously," but he still had pain. Tr. 45. His sciatic nerve was damaged causing flare-ups all the time. Tr. 45. He testified he cannot sit, stand, lie down for too long. Tr. 45. He would occasionally use a cane. Tr. 46. He would take ibuprofen for his pains. Tr. 47. He would need to lie down for 15-30 minutes two or three times per day. Tr. 54.

At the January 2021 hearing, Plaintiff testified that his anxiety had become "exponentially worse" since the previous hearing. Tr. 1533. He would do anything to avoid being around people. Tr. 1547. His back pain had gotten worse. Tr. 1535. When he is more active, the pain gets worse. Tr. 1545. His shoulder pain had

1 gotten better because he would favor it. Tr. 1535. He could not lift above the  
2 middle axis. Tr. 1539. Walking exacerbated his breathing issues. Tr. 1537.

### 4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social  
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
7 limited; the Commissioner's decision will be disturbed "only if it is not supported by  
8 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158  
9 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable  
10 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and  
11 citation omitted). Stated differently, substantial evidence equates to "more than a  
12 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).  
13 In determining whether the standard has been satisfied, a reviewing court must  
14 consider the entire record as a whole rather than searching for supporting evidence in  
15 isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its  
17 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one  
19 rational interpretation, [the court] must uphold the ALJ's findings if they are  
20 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674  
21 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an ALJ's

1 decision on account of an error that is harmless.” *Id.* An error is harmless “where it  
2 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115  
3 (quotation and citation omitted). The party appealing the ALJ’s decision generally  
4 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.  
5 396, 409-10 (2009).

### 6 **FIVE-STEP EVALUATION PROCESS**

7 A claimant must satisfy two conditions to be considered “disabled” within the  
8 meaning of the Social Security Act. First, the claimant must be “unable to engage in  
9 any substantial gainful activity by reason of any medically determinable physical or  
10 mental impairment which can be expected to result in death or which has lasted or  
11 can be expected to last for a continuous period of not less than twelve months.” 42  
12 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must  
13 be “of such severity that he is not only unable to do his previous work[,] but cannot,  
14 considering his age, education, and work experience, engage in any other kind of  
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §§  
16 423(d)(2)(A), 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to determine  
18 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-  
19 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
20 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is  
21

1 engaged in “substantial gainful activity,” the Commissioner must find that the  
2 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

3 If the claimant is not engaged in substantial gainful activity, the analysis  
4 proceeds to step two. At this step, the Commissioner considers the severity of the  
5 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
6 claimant suffers from “any impairment or combination of impairments which  
7 significantly limits [his or her] physical or mental ability to do basic work  
8 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
9 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
10 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
11 §§ 404.1520(c), 416.920(c).

12 At step three, the Commissioner compares the claimant’s impairment to  
13 severe impairments recognized by the Commissioner to be so severe as to preclude a  
14 person from engaging in substantial gainful activity. 20 C.F.R. §§  
15 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe  
16 than one of the enumerated impairments, the Commissioner must find the claimant  
17 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

18 If the severity of the claimant’s impairment does not meet or exceed the  
19 severity of the enumerated impairments, the Commissioner must pause to assess the  
20 claimant’s “residual functional capacity.” Residual functional capacity (RFC),  
21 defined generally as the claimant’s ability to perform physical and mental work

1 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
2 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
3 analysis.

4 At step four, the Commissioner considers whether, in view of the claimant's  
5 RFC, the claimant is capable of performing work that he or she has performed in the  
6 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the  
7 claimant is capable of performing past relevant work, the Commissioner must find  
8 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the  
9 claimant is incapable of performing such work, the analysis proceeds to step five.

10 At step five, the Commissioner should conclude whether, in view of the  
11 claimant's RFC, the claimant is capable of performing other work in the national  
12 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this  
13 determination, the Commissioner must also consider vocational factors such as the  
14 claimant's age, education, and past work experience. 20 C.F.R. §§  
15 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other  
16 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
17 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
18 work, analysis concludes with a finding that the claimant is disabled and is therefore  
19 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

20 The claimant bears the burden of proof at steps one through four above.  
21 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to

1 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
2 capable of performing other work; and (2) such work “exists in significant numbers  
3 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
4 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 5 **ALJ’S FINDINGS**

6 At step one, the ALJ found Plaintiff has not engaged in substantial gainful  
7 activity since November 1, 2014, the alleged onset date. Tr. 1503. At step two, the  
8 ALJ found that Plaintiff has the following severe impairments: asthma/chronic  
9 obstructive pulmonary disease (COPD); degenerative disc disease;  
10 spondylolisthesis; a history of hernias; a history of left shoulder dislocation with a  
11 Hill-Sachs deformity and a healed bony Bankart lesion; hepatitis C; a depressive  
12 disorder; anxiety; and history of alcohol, marijuana, and opiate abuse. Tr. 1503.

13 At step three, Plaintiff does not have an impairment or combination of  
14 impairments that meets or medically equals the severity of one of the listed  
15 impairments. Tr. 1504. The ALJ then found that Plaintiff has the residual  
16 functional capacity to perform light work with the following additional limitations:

17 [H]e can occasionally engage in overhead reaching with the non-  
18 dominant left upper extremity. He can frequently kneel, crouch, and  
19 climb ramps and stairs. The claimant can occasionally stoop, crawl,  
20 and climb ladders and scaffolds. He is limited to no concentrated  
21 exposure to hazards, such as unprotected heights, working with heavy  
machinery, or operating a motor vehicle. He is limited to no  
concentrated exposure to airborne irritants, such as dust, fumes, and  
gases. The claimant is limited to simple, routine, and repetitive tasks  
and simple work-related decisions. He is limited to occasional



1 interaction with supervisors and coworkers. The claimant should have  
2 only superficial contact with the general public with no direct contact.

3 Tr. 1506.

4 At step four, the ALJ found that Plaintiff is unable to perform past relevant  
5 work. Tr. 1518. At step five, after considering and Plaintiff's age, education, work  
6 experience, and residual functional capacity, the ALJ found that there are jobs that  
7 exist in significant numbers in the national economy that Plaintiff can perform such  
8 as routing clerk, hand packager inspector, and garment sorter. Tr. 1519. Thus, the  
9 ALJ determined that Plaintiff has not been disabled within the meaning of the Social  
10 Security Act at any time from November 1, 2014, through the date of the decision.

11 Tr. 1520.

## 12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying  
14 disability income benefits under Title II and supplemental security income under  
15 Title XVI of the Social Security Act. ECF No. 16. Plaintiff raises the following  
16 issues for review:

- 17 1. Whether the ALJ properly evaluated Plaintiff's hand impairments at step  
18 two;
- 19 2. Whether the ALJ properly considered the medical opinion evidence; and
- 20 3. Whether the ALJ properly considered Plaintiff's subjective complaints.

21 ECF No. 16 at 2.

## DISCUSSION

### A. Title XVI

Before reaching Plaintiff's assignments of error, the Court must address Defendant's argument that Plaintiff's Title XVI claim should be dismissed. ECF No. 17 at 2. Plaintiff died in February 2021, after the ALJ's decision and before this case was filed. ECF No. 2. Pursuant to 42 U.S.C. § 1383(b), a claimant's right to Title XVI benefits is generally extinguished upon the death of the claimant unless there is a surviving eligible spouse or in other circumstances inapplicable here. *See* 20 C.F.R. § 416.542(b)(1). Plaintiff died without a surviving spouse. Thus, the SSI claim is extinguished and should be dismissed.

Plaintiff argues the Title XVI claim should not be dismissed because the State of Washington paid interim assistance to Plaintiff and regulations and policies provide that back payments of SSI may first be paid to reimburse the state for public assistance received. ECF No. 18 at 2-4. However, Plaintiff cites no authority giving him standing to pursue reimbursement of state benefits paid by the State of Washington and the Court finds none. *See Parra v. Astrue*, 481 F.3d 742, 745 (9th Cir. 2007) (noting that "because [the claimant] died without a surviving spouse, the ALJ dismissed the claim for SSI benefits"); *Mendoza v. Astrue*, 237 F. App'x 164,

1 165 (9th Cir. 2007) (concluding death of claimant mooted her Title XVI claim for  
2 SSI benefits); *Joshua G. v. Kijakazi*, No. 4:20-CV-05188-ACE, 2022 WL 4596701,  
3 at \*1 (E.D. Wash. July 26, 2022), *report and recommendation adopted*, No. 4:20-  
4 CV-05188-MKD, 2022 WL 4596700 (E.D. Wash. Aug. 12, 2022) (dismissing Title  
5 XVI claim for lack of standing when claimant died before commencement of suit);  
6 *Casares v. Kijakazi*, No. 1:21-CV-1506-HBK, 2022 WL 891287, at \*1 (E.D. Cal.  
7 Mar. 25, 2022) (dismissing Title XVI claim as extinguished on unmarried claimant's  
8 death); *Reveles v. Comm'r of Soc. Sec. Admin.*, No. CV-17-1024-PHX-DKD, 2018  
9 WL 330053, at \*1 (D. Ariz. Jan. 9, 2018) (finding claimant's death "extinguished  
10 her Title XVI claim and left only her Title II claim to be pursued by her son's  
11 father"); *Hutzler v. Colvin*, No. 2:12-CV-512, 2013 WL 4805969, at \*1 (D. Utah  
12 Sept. 9, 2013) (finding unmarried claimant's death extinguished her claim for SSI);  
13 *see also Sue B. v. Comm'r of Soc. Sec.*, No. 1:21-CV-00259, 2023 WL 1109741, at  
14 \*1 (W.D.N.Y. Jan. 30, 2023) ("Since Plaintiff did not leave a spouse at the time of  
15 her death, and was not a disabled child living her parent, her Title XVI claim  
16 extinguished upon her death."); *Portland G. v. Comm'r of Soc. Sec.*, No. 1:20-CV-  
17 01035-EAW, 2023 WL 1097459, at \*2 (W.D.N.Y. Jan. 30, 2023) (finding  
18 claimant's Title XVI claim extinguished upon her death since she did not leave a  
19 surviving spouse); *Lucas ex rel. McCoy v. Astrue*, No. 2:11-CV-00429, 2012 WL  
20 1085537, at \*1 (S.D. Ohio Mar. 30, 2012), *report and recommendation adopted*, No.  
21 2:11-CV-429, 2012 WL 2576640 (S.D. Ohio July 3, 2012) (dismissing claim for SSI

1 benefits because claimant's son did not have standing to pursue the Title XVI claim  
2 after her death); *Hall ex rel. Hall v. Astrue*, No. 3:10-CV-143-RLY-WGH, 2011 WL  
3 4625949, at \*1 (S.D. Ind. Sept. 30, 2011), *aff'd*, 489 F. App'x 956 (7th Cir. 2012)  
4 (noting rights under Title XVI are generally extinguished upon the death of the  
5 claimant and concluding the court had no jurisdiction of Title XVI claim brought by  
6 mother of deceased claimant).

7 Accordingly, the Title XVI claim is dismissed for lack of jurisdiction under  
8 FRCP 12(b)(1).

#### 9 **B. Relevant Period**

10 Because only the Title II claim remains, disability must be established before  
11 the date last insured. See 42 U.S.C. § 423(c); 20 C.F.R. § 404.1520. The period of  
12 consideration for disability insurance benefits begins with the alleged onset and ends  
13 on the date the claimant was last insured for disability. See *Vertigan v. Halter*, 260  
14 F.3d 1044, 1047 n.1 (9th Cir. 2001). Plaintiff must therefore establish disability  
15 between November 1, 2014, and September 30, 2015. Tr. 185, 291. Generally,  
16 evidence outside the "actual period at issue" is of limited relevance. See *Turner v.*  
17 *Comm'r of Soc. Sec. Admin.*, 613 F.3d 1217, 1224 (9th Cir. 2010). However, to the  
18 extent evidence relates to the period at issue or is relevant to establishing disability  
19 during that period of eligibility, it may be considered.

#### 20 **C. Step Two**

21

1 Plaintiff contends the ALJ erred by failing to properly determine his hand  
2 impairments at step two. ECF No. 16 at 4. At step two of the sequential process,  
3 the ALJ must determine whether there is a medically determinable impairment  
4 established by objective medical evidence from an acceptable medical source. 20  
5 C.F.R. § 416.921. The impairment must be shown by “medically acceptable  
6 clinical and laboratory diagnostic techniques.” *Id.* A statement of symptoms, a  
7 diagnosis, or a medical opinion does not establish the existence of an impairment.  
8 *Id.* After a medically determinable impairment is established, the ALJ must  
9 determine whether the impairment is “severe;” i.e., one that significantly limits his  
10 or her physical or mental ability to do basic work activities. 20 C.F.R. §  
11 416.920(c). However, the fact that a medically determinable condition exists does  
12 not automatically mean the symptoms are “severe” or “disabling” as defined by the  
13 Social Security regulations. *See e.g., Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d  
14 at 603; *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985).

15 Step two is not meant to identify the impairments that should be considered  
16 when determining the RFC. *Buck v. Berryhill*, 869 F.3d 1040, 1048–49 (9th Cir.  
17 2017). In fact, “[i]n assessing RFC, the adjudicator must consider limitations and  
18 restrictions imposed by all of an individual's impairments, even those that are not  
19 ‘severe.’” Social Security Ruling (S.S.R.) 96-8p, 1996 WL 374184, at \*5 (July 2,  
20 1996). Thus, the ALJ must consider the effect of all impairments, including  
21

1 medically determinable but non-severe impairments, in evaluating the RFC. 20  
2 C.F.R. § 416.945(a)(2).

3 Plaintiff argues his hand conditions should have been identified by the ALJ as  
4 medically determinable impairments. ECF No. 16 at 4-5. The first evidence cited  
5 by Plaintiff is an assessment of carpal tunnel syndrome from a treating provider in  
6 October 2016. ECF No. 16 at 4 (citing Tr. 860). As noted *supra*, a medically  
7 determinable impairment can only be established by medically acceptable clinical  
8 and laboratory diagnostic techniques and not by diagnosis alone. 20 C.F.R. §  
9 416.921. Other evidence cited by Plaintiff regarding carpal tunnel and cubital tunnel  
10 syndrome is from 2019. ECF No. 16 at 4-5 (citing Tr. 1908). Even assuming  
11 *arguendo* that the ALJ erred in considering this evidence (and the Court does not so  
12 find), there is no evidence establishing hand limitations during the relevant period.  
13 Thus, any error by the ALJ in failing to find a hand condition a medically  
14 determinable impairment is harmless.

15 **D. Symptom Testimony**

16 An ALJ engages in a two-step analysis to determine whether a claimant's  
17 testimony regarding subjective pain or symptoms is credible. "First, the ALJ must  
18 determine whether there is objective medical evidence of an underlying  
19 impairment which could reasonably be expected to produce the pain or other  
20 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).  
21 "The claimant is not required to show that her impairment could reasonably be

1 expected to cause the severity of the symptom she has alleged; she need only show  
2 that it could reasonably have caused some degree of the symptom.” *Vasquez v.*  
3 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

4 Second, “[i]f the claimant meets the first test and there is no evidence of  
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal  
8 citations and quotations omitted). “General findings are insufficient; rather, the  
9 ALJ must identify what testimony is not credible and what evidence undermines  
10 the claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *see also Thomas*,  
11 278 F.3d at 958 (“[T]he ALJ must make a credibility determination with findings  
12 sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily  
13 discredit claimant’s testimony.”). “The clear and convincing [evidence] standard  
14 is the most demanding required in Social Security cases.” *Garrison*, 759 F.3d at  
15 1015 (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
16 2002)).

17 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*  
18 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the  
19 claimant’s testimony or between her testimony and her conduct; (3) the claimant’s  
20 daily living activities; (4) the claimant’s work record; and (5) testimony from  
21

1 physicians or third parties concerning the nature, severity, and effect of the  
2 claimant's condition. *Thomas*, 278 F.3d at 958-59.

3 The ALJ first found the objective medical evidence is not consistent with the  
4 symptoms and limitations alleged by Plaintiff. Tr. 1508-14. While subjective  
5 pain testimony may not be rejected solely because it is not corroborated by  
6 objective medical findings, the medical evidence is a relevant factor in determining  
7 the severity of a claimant's pain and its disabling effects. *Rollins v. Massanari*,  
8 261 F.3d 853, 857 (9th Cir. 2001).

9 The ALJ discussed the objective evidence regarding each of Plaintiff's  
10 primary impairments and made findings accordingly. Tr. 1508-14. Having  
11 reviewed the ALJ's findings and the record in detail, the Court observes that most of  
12 the ALJ's discussion of the objective evidence regarding Plaintiff's back  
13 impairment, shoulder impairment, asthma, hepatitis C, and mental health involves  
14 records from outside the relevant period. Tr. 1508-14. The Court notes records  
15 during the relevant period are limited, suggesting that perhaps there is insufficient  
16 evidence of one more of Plaintiff's conditions during that time period. *See* Tr. 376-  
17 81, 496-98, 670-76, 717-857, 844-52. However, because the ALJ's assessment of  
18 Plaintiff's allegations is significantly based on the assessment of the objective  
19 evidence, and because a significant portion of the objective evidence relied upon by  
20 the ALJ may now be less relevant, the ALJ's finding that Plaintiff's claims are  
21



1 inconsistent with the objective evidence must be reassessed in light of Plaintiff's  
2 date last insured.

3 For example, most of the ALJ's discussion of Plaintiff's back impairment  
4 focuses on Plaintiff's condition post-July 2016 surgery. Tr. 1508-09. Plaintiff's  
5 condition after surgery may be less relevant to establishing disability before  
6 September 30, 2015, Plaintiff's date last insured. Similarly, the ALJ considered  
7 Plaintiff's asthma starting with an exam record from 2018. Tr. 1510. Since  
8 Plaintiff's asthma has existed since childhood, its impact on Plaintiff's functioning  
9 should be reevaluated in the context of the relevant period. The ALJ's discussion of  
10 Plaintiff's shoulder impairment, hepatitis C, and mental health issues all similarly  
11 need to be reassessed based on records relevant to establishing disability before his  
12 date last insured. It is the ALJ's duty, not the Court's, to weigh the evidence and  
13 make appropriate findings. The ALJ, not this court, is responsible for reviewing the  
14 evidence and resolving conflicts or ambiguities. *Magallanes v. Bowen*, 881 F.2d  
15 747, 751 (9th Cir.1989); *see Richardson v. Perales*, 402 U.S. 389, 400 (1971). The  
16 Court cannot substitute its conclusions for the ALJ's or speculate as to the ALJ's  
17 possible conclusions. *See Bunnell*, 947 F.2d at 346. The matter must be remanded  
18 for reconsideration of the evidence in light of the relevant period.

19 Additionally, the ALJ found that Plaintiff's activities of daily living are not  
20 entirely consistent with allegations of debilitating symptoms and limitations. Tr.  
21 1514. It is reasonable for an ALJ to consider a claimant's activities which

1 undermine claims of totally disabling pain in evaluating symptom claims. *See*  
2 *Rollins*, 261 F.3d at 857. However, it is well-established that a claimant need not  
3 “vegetate in a dark room” in order to be deemed eligible for benefits, *Cooper v.*  
4 *Bowen*, 815 F.2d 557, 561 (9th Cir. 1987), and a claimant need not be utterly  
5 incapacitated in order to be eligible for benefits, *Fair v. Bowen*, 885 F.2d 597, 603  
6 (9th Cir. 1989). Many activities are not easily transferable to what may be the more  
7 grueling environment of the workplace, where it might not be possible to rest or take  
8 medication. *Id.* The activities identified by the ALJ as inconsistent with Plaintiff’s  
9 allegations are his ability to attend to daily activities, maintain hygiene, manage  
10 medication, and accomplish tasks around the house with breaks; manage bills, buy  
11 groceries, use public transportation; request paperwork; prepare food, medications,  
12 attend doctor visits; attend 12-step meetings; attend church support group; helping  
13 his housemate with cooking and cleaning; preparing simple meals, although he  
14 cannot take the garbage out because it requires stairs. Tr. 1514 (citing B9F3,  
15 B20F47, B23F139). Most of these activities are basic survival activities which can  
16 be done at a pace and rate consistent with Plaintiff’s allegations. The Ninth Circuit  
17 has “repeatedly warned that ALJs must be especially cautious in concluding that  
18 daily activities are inconsistent with testimony about pain, because impairments that  
19 would unquestionably preclude work and all the pressures of a workplace  
20 environment will often be consistent with doing more than merely resting in bed all  
21 day.” *Garrison*, 759 F.3d at 1016; *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.

2001) (“This court has repeatedly asserted that the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from [his testimony] as to [his] overall disability.”). The ALJ cited no evidence suggesting that the limited activities cited in the decision were performed by Plaintiff in a manner transferable to a work setting, nor did the ALJ describe how these activities contradict his reported symptom claims. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007). This reason is not supported by substantial evidence.

Defendant asserts the ALJ gave a third reason for giving less than full credit Plaintiff’s pain and symptom allegations, which is that Plaintiff did not take prescription pain medications. ECF No. 17 at 9. The Court notes that while the ALJ cited significant portions of the record in evaluating Plaintiff’s symptom claims, providing a summary of medical evidence is not the same as providing clear and convincing reasons for finding the claimant’s symptom testimony not credible. *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir. 2015). The ALJ’s passing comments about a lack of prescription medication may not qualify as a clear and convincing reasons supported by substantial evidence. Although the ALJ’s analysis need not be extensive, the ALJ must provide some reasoning in order for us to meaningfully determine whether the ALJ’s conclusions were supported by substantial evidence. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014). Since this matter is remanded for reevaluation of disability

1 before the closed period, the ALJ should ensure that any reasons provided for  
2 giving less weight to Plaintiff's symptom claims are clearly stated and properly  
3 supported by substantial evidence.

#### 4 **E. Medical Opinions**

5 Plaintiff contends the ALJ improperly evaluated the opinions of Charles  
6 Miller, M.D., who completed two evaluations in April 2018 (Tr. 993-97, 1191-92,  
7 and a third evaluation in December 2019 (Tr. 2289-93); A. Massenburg, PA-C,  
8 who completed an evaluation in April 2016; Jennifer Olson, PA-C, who completed  
9 an evaluation in January 2016 (Tr. 975-77); David T. Morgan, Ph.D., who  
10 completed an evaluation in February 2020 (Tr. 2069-74); and R. Renee  
11 Eisenhower, who completed a review of the evidence in February 2020 (Tr. 2302-  
12 23).

13 There are three types of physicians: "(1) those who treat the claimant  
14 (treating physicians); (2) those who examine but do not treat the claimant  
15 (examining physicians); and (3) those who neither examine nor treat the claimant  
16 but who review the claimant's file (nonexamining or reviewing physicians)."  
17 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).  
18 "Generally, a treating physician's opinion carries more weight than an examining  
19 physician's, and an examining physician's opinion carries more weight than a  
20 reviewing physician's." *Id.* "In addition, the regulations give more weight to  
21 opinions that are explained than to those that are not, and to the opinions of

1 specialists concerning matters relating to their specialty over that of  
2 nonspecialists.” *Id.* (citations omitted).<sup>2</sup>

3 If a treating or examining physician’s opinion is uncontradicted, an ALJ may  
4 reject it only by offering “clear and convincing reasons that are supported by  
5 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
6 “However, the ALJ need not accept the opinion of any physician, including a  
7 treating physician, if that opinion is brief, conclusory and inadequately supported by  
8 clinical findings.” *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
9 (internal quotation marks and brackets omitted). “If a treating or examining doctor’s  
10 opinion is contradicted by another doctor’s opinion, an ALJ may only reject it by  
11 providing specific and legitimate reasons that are supported by substantial  
12 evidence.” *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31  
13 (9th Cir. 1995)).

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14  
15 <sup>2</sup>For claims filed on or after March 27, 2017, the regulations changed the  
16 framework for evaluation of medical opinion evidence. *Revisions to Rules*  
17 *Regarding the Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg.  
18 5844-01 (Jan. 18, 2017); 20 C.F.R. § 404.1520c. The Appeals Council directed the  
19 ALJ to consider Plaintiff’s consolidated claim under the prior regulations. Tr.  
20 1602.  
21

1 Further, the opinion of an acceptable medical source, such as a physician or  
2 psychologist, is given more weight than that of an “other source.” 20 C.F.R. §  
3 416.927 (2012); *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). “Other  
4 sources” include nurse practitioners, physician assistants, therapists, teachers, social  
5 workers, spouses, and other non-medical sources. 20 C.F.R. § 416.913(d) (2013).  
6 However, the ALJ is required to “consider observations by non-medical sources as  
7 to how an impairment affects a claimant’s ability to work.” *Sprague v. Bowen*, 812  
8 F.2d 1226, 1232 (9th Cir. 1987). Pursuant to *Dodrill v. Shalala*, 12 F.3d 915, 919  
9 (9th Cir. 1993), an ALJ must give reasons germane to “other source” testimony  
10 before discounting it.

11 All of the medical opinions at issue are dated after Plaintiff’s date last insured.  
12 Due to the dismissal of the SSI claim, the ALJ must reevaluate the medical and  
13 psychological opinion evidence to determine whether any opinion or opinions relate  
14 back to the period before Plaintiff’s date last insured and assign weight accordingly.

### 15 CONCLUSION

16 Having reviewed the record and the ALJ’s findings, this Court concludes the  
17 ALJ’s decision is not supported by substantial evidence and free of harmful legal error.

18 Accordingly,

19 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 16**, is **GRANTED**  
20 **in part.**


2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
**GRANTED in part** and **DENIED in part**. Plaintiff's Title XVI claim is dismissed.

3. This case is **REVERSED** and **REMANDED** for further administrative proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. § 405(g).

4. Upon proper presentation, this Court will consider Plaintiff's application for costs, expenses, and reasonable attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(a), (d).

**IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for Plaintiff and the file shall be **CLOSED**.

**DATED** August 28, 2023.

  
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LONNY R. SUKO  
Senior United States District Judge